

COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE

ENTERPRISE VILLAGE, LLC	)	
	)	
	)	
Appellant	)	
	)	
v.	)	No. 05-07
	)	
YARMOUTH BOARD OF APPEALS,	)	
Appellee	)	
	)	

**RULINGS ON MOTION TO DISMISS AND REQUEST TO INTERVENE**

This is an appeal pursuant to G.L. c. 40B, § 22, and 760 CMR §§ 30.00 and 31.00, brought by Appellant Enterprise Village, LLC (Enterprise) of a decision of Appellee Yarmouth Board of Appeals denying a comprehensive permit. Enterprise originally applied for a comprehensive permit for 80 units of rental housing on approximately 6 acres in Yarmouth, Massachusetts. Of the 80 units proposed, 20 were designated as low and moderate income housing to be subsidized by Mass Housing Finance Agency (MassHousing). During the proceeding before the Board, Enterprise submitted a new proposal for 16 rental units and 24 condominiums of which 4 rental and 6 home ownership units would be affordable. The proposed project is located on undeveloped land within a commercially zoned area of land largely used currently for industrial purposes.

The Board has moved to dismiss this appeal arguing that the Housing Appeals Committee lacks jurisdiction of this matter. Also, Mr. Paul Childs and Ms. Kim Catalano, owners of commercial property at 19 Enterprise Road, opposite the proposed project site, have moved to intervene in the appeal. Enterprise opposes the motion to dismiss and submitted a Motion for Immediate Hearing. The request for a hearing on the motion to dismiss is denied.

Neither the developer nor the Board responded to the proposed interveners' request to intervene.

## **I. MOTION TO DISMISS**

In support of dismissal for lack of jurisdiction, the Board raises two grounds: that Enterprise has not shown the project is fundable as required by 760 CMR 31.01(b) and that Enterprise lacks control of the site within the meaning of 760 CMR 31.01(c). Both parties have submitted affidavits and exhibits in connection with the motion. For the reasons set out below, neither ground warrants dismissal of this appeal.

### **A. Fundability.**

Under the Committee's regulations, "[f]undability shall be established by submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency....." 760 CMR 31.01(2). Issuance of such a project eligibility determination creates a rebuttable presumption of fundability. 760 CMR 31.07(1). "After issuance of a determination of Project Eligibility (Site Approval), the project shall be considered fundable unless there is sufficient evidence to determine that the project is no longer eligible for a subsidy." 760 CMR 31.01(2)(f). The Committee should not hear evidence concerning fundability other than evidence "as to the status of the project before the subsidizing agency." 760 CMR 31.07(4)(a). In most cases, such evidence will come in the form of official notification from the subsidizing agency, MassHousing. See *Farmview Affordable Homes, LLC v. Sandwich*, No. 02-32, slip op. at 4 (Mass. Housing Appeals Committee May 21, 2004).

The Board claims that the site eligibility letter issued by MassHousing no longer establishes the fundability of the project because Enterprise amended its application to change its project from rental housing to mixed rental and homeownership although MassHousing's letter refers solely to rental housing. The Board argues that with this amended application, Enterprise withdrew its original application, and the MassHousing letter, referring to rental housing, is no longer applicable to the project.

In response to the motion, Enterprise submitted a November 10, 2004 letter from MassHousing responding to Enterprise's notice of a proposal change. That letter stated, with regard to a proposal to reduce the number of units from 80 two-bedroom rental units to 24 units (12 homeownership and 12 rental):

We understand that you have proposed these changes in response to negotiations with the Town of Yarmouth and its Zoning Board of Appeal, and encourage you to continue negotiations in good faith to arrive on a proposed development mutually acceptable to all parties. Should you receive a comprehensive permit, we will review the revised proposal for Final Approval in its entirety pursuant to requirements of the NEF program. To facilitate your submittal of a Final Approval application at that time, we have attached a copy of the Final Approval Checklist identifying the documents that you must submit to MassHousing for our review and approval.

Siddarth Affidavit, Exh. I, Letter dated November 10, 2004 from Nancy Anderson, MassHousing, to Siddarth Siddarth. This letter supports, rather than undercuts, the presumption of fundability in the original MassHousing letter.

Even in the unusual case where there is some uncertainty about fundability, the board or the Committee does not supplant the subsidizing agency and conduct a full review of these issues. Rather, "[t]he best evidence on these subjects is in the negotiations between the developer and the subsidizing agency." *CMA v. Westborough*, No. 89-25, slip op. at 8 (Mass. Housing Appeals Committee June 25, 1992), quoting from *Stoneham Heights Ltd. Partnership v. Stoneham*, No. 87-04, slip op. at 29, 32 (Mass. Housing Appeals Committee Mar. 20, 1991). On this record, Enterprise has satisfied MassHousing requirements regarding potential changes to the project configuration and the lack of a site approval letter specifying mixed rental and homeownership units from MassHousing is not material at this time. Enterprise has established fundability. 760 CMR 31.01(2)(f). The Board's motion to dismiss is denied.

In any event, the Board's other ground for dismissal is unsupported on the record. The parties' affidavits and exhibits demonstrate a factual dispute regarding whether Enterprise has formally withdrawn its original application in submitting an amended application. The Board's decision stating that the original application was withdrawn is contradicted by the testimony in the Siddarth Affidavit that the original application was never withdrawn. The minutes of proceedings before the Board do not resolve the issue of whether the revisions and amended application related to a formal withdrawal of the original application. Designing, financing, and getting approvals for a housing project is "a dynamic, constantly evolving process." *CMA v. Westborough*, No. 89-25, slip op. at 20 (Mass. Housing Appeals Committee June 25, 1992), quoting from *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 17 (Mass. Housing Appeals Committee March 25, 1987). It is common for the parties to consider alternatives or even entirely different proposals during informal negotiations during

proceedings before the Board. While “the developer cannot require the board to formally respond to two or more entirely different proposals simultaneously, nor can the board require the developer to submit a second, different proposal.” *Settlers Landing Realty Trust v. Barnstable*, No. 01-08, slip op. at 2 (Mass. Housing Appeals Committee Sept. 22, 2003). The record here, with its factual contradictions, does not allow a ruling on this issue and the motion to dismiss cannot be granted on this basis.

### **B. Site Control.**

In support of its contention that the purchase and sale agreement for the project site does not cover the entire geographic area of the project site, the Board submitted copies of documents introduced at the hearing before the Board, including plans for the revised proposal for mixed ownership and rental housing. These plans include an area not contained on the plan attached to the purchase and sale agreement. LaChance Affidavit, Exhs. B-1, B-3, C-2, C-3. However, the question of site control does not rest solely on these documents. In response to the motion to dismiss, Enterprise submitted the affidavit of Mr. Siddarth, who states that he is the manager of Enterprise, and that he owns in fee simple a small parcel which, together with the property subject to the purchase and sale agreement, makes up the 6.5 acre area on which the project would be built. Siddarth Affidavit, pars. 1, 22.

Two adjacent parcels may make up a project site. *Weston Development Group et al. v. Hopkinton*, No. 00-05, slip op. at 11 (Mass. Housing Appeals Committee May 26, 2004). Enterprise has shown that it controls the site within the meaning of 760 CMR 31.01(c), through a combination of property subject to a purchase and sale agreement and through ownership of a parcel by a principal of Enterprise. Accordingly, the Board’s motion to dismiss is denied.

## **II. MOTION TO INTERVENE**

The Housing Appeals Committee’s standards for intervention require Mr. Childs and Ms. Catalano (the proposed interveners) to show that: 1) they will be substantially and specifically affected by the outcome of the proceedings before the Committee and specifically that their harm would be related to the granting of relief from local regulation as requested by the developer in this appeal; 2) their harm is not a common harm shared by all the residents of the town; and 3) the Board will not diligently represent those interests. 760 CMR 30.04(2). *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 6-7 (Mass. Housing Appeals

Committee May 26, 2004). “In determining whether to permit a person to intervene, the presiding officer shall consider only those interests and concerns of that person which are germane to the issues of whether the requirement and regulations of the city or town make the proposal uneconomic or whether the proposal is consistent with local needs.” 760 CMR 30.04(2).

The project is proposed to be located in the midst of “an active industrial zone” according to the Board’s decision, including a vehicle spring manufacturing installation and repair service, a septic system contractor and an auto body shop. The impacts on potential residents of the project caused by the heavy traffic, noise, and fumes generated by these businesses are the main focus of the Board’s decision to deny the comprehensive permit.

The proposed interveners allege that they own the commercial property located at 19 Enterprise Road, directly opposite the proposed project. Although their request to intervene does not specify the nature of their business, they allege that the proposed project:

- 1) raises safety issues involved in placing affordable housing with a relatively young population in an established commercial zone;
- 2) raises quality of life issues for the residents;
- 3) will add to an already congested main route for emergency vehicles to Cape Cod Hospital (general);
- 4) will be dangerously close to the town well fields;
- 5) will increase traffic hazards by adding car volume at a pivotal point on Willow Street; and
- 6) will impact the existing commercial properties with the addition of a residential housing development placed directly in the middle of an active functioning commercial zone.

The proposed interveners’ issues do not rise to a basis for their participation as interveners. First, the grounds relating to safety for children or residents (Allegations 1 and 4) and quality of life for residents (Allegation 2) refer to adverse impacts on future residents of the site, concerns that are well outside the scope of permitted intervention. Other allegations potentially could relate to the impact of the project specifically on the proposed interveners. These allegations relate to traffic concerns (Allegations 3 and 5) and a general reference that the project “will impact the existing commercial properties.” (Allegation 6). However, these allegations are vague and lack any specificity necessary to show the concerns are serious

enough to be more than mere speculation. Moreover, the allegations do not indicate that the concerns, particularly the traffic concerns, affect the abutters more than residents of the town in general. Accordingly the proposed interveners have not met the criteria for intervention. Further, as the Board has not conducted a full hearing and considered the application on its merits, it is unknown whether the Board would diligently represent their interests. However, the Board's decision shows that it shares many, if not all, of these concerns.

Mr. Childs and Ms. Catalano's motion to intervene is hereby denied. However, they will be permitted to participate as interested persons in accordance with 760 CMR 30.04(4).

Housing Appeals Committee

Date: October 14, 2005

A handwritten signature in cursive script, reading "Shelagh A. Ellman-Pearl", written over a horizontal line.

Shelagh A. Ellman-Pearl  
Presiding Officer